SUPREME COURT, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SUNSHINE BISCUITS, INC.,

Petitioner,

v.

KAY APPONI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Asher Bogin
Counsel of Record

BOGIN & PATTERSON
1200 Talbott Tower
131 N. Ludlow Street
Dayton, Ohio 45402
(513) 226-1200

Attorney for Respondents

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

Respondent is not satisfied with the questions as presented by Petitioner and suggests the following single question instead:

> In an action to recover pensions under a collectively bargained pension plan, where the interpretation of the plan is affected by an estoppel created by representations made by the employer during labor negotiations, did the Court below err in applying a state statute of limitations for breach of contract.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	I
TABLE OF AUTHORITIES	III
STATUTORY PROVISION INVOLVED	VI
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Acri v. *International Association of Machinists*, 781 F.2d 1393 (9th Cir., 1986)	8
Adams v. *Gould, Inc.*, 739 F.2d 858 (3rd Cir., 1984) reh. den. 7/25/84	7
Andres v. *Teamsters Local 600*, 724 F.2d 73 (8th Cir., 1983)	8
Apponi v. *Sunshine Biscuits, Inc.*, 652 F.2d 643 (6th Cir. 1981)	6
Apponi v. *Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987)	4, 5, 6, 8, 9
Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966)	*passim*
Byrne v. *Buffalo Creek Railroad Company*, 765 F.2d 364 (2d Cir., 1985)	8, 9

Page

Cohen v. *Martin's*,
694 F.2d 296 (2nd Cir., 1982) 7

DelCostello v. *International Brotherhood of Teamsters*,
462 U.S. 151 (1983) ..... *passim*

Edwards v. *Teamsters Local Union 36*,
719 F.2d 1036 (9th Cir., 1983) cert. den. ____ U.S.
____, 104 S.Ct. 1599 8

Federation of Westinghouse Indepedent Salaried Unions v. *Westinghouse Electric Corp.*, 736 F.2d 896 (3d Cir. 1984) 2

International Association of Machinists v. *Allied Products Corp.*, 786 F.2d 1561 (11th Cir. 1986) 2

International Union, UAW v. *Hoosier Cardinal Corp.*,
338 U.S. 696 (1966) 4

Jameson v. *Bethlehem Steel Corp. Pension Plan*,
765 F.2d 49 (3d Cir., 1985) 7

Jenkins v. *Local 705, International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir., 1983) 7

Jones v. *Consolidated Freightways Corp. of Delaware*,
776 F.2d 1458 (10th Cir., 1985) 8

Kelley v. *International Brotherhood of Electrical Workers*, 803 F.2d 516 (9th Cir., 1986) 8

Martin v. *Bankers Trust Co.*,
565 F.2d 1276 (4th Cir., 1977) 7

McCreedy v. *Local Union No. 971*,
809 F.2d 1232 (6th Cir., 1987) 2, 3, 4

Miles v. *New York State Teamsters Conference*,
698 F.2d 593 (2d Cir., 1983), cert. den. ____ U.S.
____, 104 S.Ct. 105 7

Murray v. *Branch Motor Express Co.*,
723 F.2d 1146 (4th Cir., 1983) 8

Page

Paris v. *Profit Sharing Plan*,
637 F.2d 357 (5th Cir., 1981), cert. den., 454 U.S.
836 (1981) 7

Perez v. *Dana Corp.*,
718 F.2d 581 (3d Cir., 1983) 8

Peterson v. *Kennedy*,
771 F.2d 1244 (9th Cir., 1985) 8

Quinn v. *County Club Soda*,
639 F.2d 838 (1st Cir., 1981) 7

Reiherzer v. *Shannon*,
581 F.2d 1266 (7th Cir., 1978) 7

Sethre v. *Washington Education Association*,
22 Wash. App. 666, 591 P.2d 838, review den., 92
Wash. 2d 1020 (1979) 7

Smith v. *General Motors Corp.*,
747 F.2d 372 (6th Cir., 1984) 8

Teamsters Union Local 315 v. *Great Western Chemical Co.*, 781 F.2d 764 (9th Cir. 1986) 2

Van Fossan v. *International Brotherhood of Teamsters*, 649 F.2d 1243 (7th Cir., 1981) 7

Welyczko v. *U.S. Air, Inc.*,
733 F.2d 239 (2d Cir.) cert. den., ____ U.S. ____,
105 S.Ct. 512 (1984) 8, 9

Winer v. *Edison Brothers Stores Pension Plan*,
593 F.2d 307 (8th Cir., 1979) 7

Woodfork v. *Marine Cooks & Stewards Union*,
642 F.2d 966 (5th Cir., 1981) 7

STATUTORY PROVISIONS

29 U.S.C. § 160(b) 4

29 U.S.C. § 185(a) 3

29 U.S.C. § 1132(a)(1) 6

STATUTORY PROVISION INVOLVED

In addition to the statute set forth in the Petition herein, Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1), which is set forth in full below, is also involved:

A civil action may be brought:

(1) by a participant or beneficiary.

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

No. 86-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SUNSHINE BISCUITS, INC.,

Petitioner,

v.

KAY APPONI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

There is no conflict among or within the Circuit Courts of Appeals with respect to the interpretation of, or the distinction between, the decisions of this Court in *DelCostello* and *Hoosier Cardinal* on the question of what statute of limitation to apply in actions under Section 301 of the LMRA; to the contrary, the Courts of Appeals have followed not only the letter but the spirit of both cases. Unless it is intended to overrule *DelCostello* and *Hoosier Cardinal*, therefore, there is no reason for intervention of this Court in the present case.

Even if it is intended to overrule the decisions in *DelCostello* and *Hoosier Cardinal*, this case presents a ques-

tionable vehicle for such change because the statute of limitations issue under Section 301 of the LMRA is not reached unless three other major issues, extraneous to the question presented, are first decided adversely to Respondents: (1) whether a defense under Section 301 survived the failure to plead or raise it timely; (2) whether the statute of limitations question in this action to recover pensions is governed by LMRA or by ERISA and, if ERISA, what limitation period should apply; and (3) whether *DelCostello* should in any event be applied retroactively to a cause of action which arose some time before the filing of this action in 1977.

ARGUMENT

Petitioner asks this Court to grant the writ it seeks so that claimed inconsistencies among the Courts of Appeals in the application of the decisions of this Court in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and *Auto Workers* v. *Hooser Cardinal Corp.*, 383 U.S. 696 (1966), may be resolved. Petitioner claims that "among, and even within, the Courts of Appeals, confusion reigns," and that the relationship between the two cases "has resulted in a maze of appellate decisions with no readily discernible pattern."

Petitioner seeks to show this reigning confusion by noting that some circuit court decisions have applied state contract statutes of limitations to "straightforward" Section 301 suits, whereas in four cases (*Federation of Westinghouse Independent Salaried Unions* v. *Westinghouse Electric Corp.*, 736 F.2d 896 (3d Cir. 1984); *Teamsters Union Local 315* v. *Great Western Chemical Co.*, 781 F. 2d 764 (9th Cir. 1986); *International Association of Machinists* v. *Allied Products Corp.*, 786 F.2d 1561 (11th Cir. 1986); *McCreedy* v. *Local Union No. 971*, 809 F.2d 1232 (6th Cir. 1987) (the "Four Appellate Cases"), the Courts of Appeals applied the *DelCostello* six-month statute.

Actually, however, the decisions in the Four Appellate Cases demonstrate a consistent and reasonable interpretation of the meaning of, and relationship between, the *DelCostello* and *Hoosier Cardinal* decisions. All of the Four Appellate Cases involve actions to compel arbitration under collective bargining contracts. The basis of all four of those decisions is that an action to compel arbitration is more like a hybrid breach of agreement/unfair representation case (as in *DelCostello*) than a simple contract action brought by a union to recover vacation pay (as in *Hoosier Cardinal*). None of those cases holds that the six months statute applies in all suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or that it should apply in a Section 301 suit to recover only money benefits.

The instant case is a suit to recover pay under a pension plan which is incidental to, but not directly a part of, a collective bargaining contract.

The Four Appellate Cases apply the *DelCostello* reasoning to suits to compel arbitration. Those decisions are based upon the important place of provisions for arbitration of disputes in the federal scheme for regulation of labor relations. As stated by the Sixth Circuit in *McCreedy* (which cites with approval the other three of the Four Appellate Cases),

> "Arbitration is a policy at the heart of federal labor law, which has been, and will continue to be greatly favored by the courts. To delay its occurrence by applying a six or twenty year state statute of limitations applicable to oral or written contracts would defeat its purpose — the speedy resolution of disputes." *McCreedy* at 1237.
>
> * * *
>
> "Unlike the claim involved in *Hoosier Cardinal*, an action to compel arbitration is not readily analogous to a traditional breach of contract where damages are sought. Unlike most contracts, collective bargaining agreements establish a grievance resolution process in order to insure a smoothly functioning labor-

> management relationship. Efficiency is a fundamental concern of both union and management . . . . Here, the union seeks only to enforce the grievance and arbitration procedures so essential to the smooth operation of the process." *McCreedy* at 1238.

Earlier in the decision, the Court had noted the distinction drawn in *DelCostello* between that decision and *Hoosier Cardinal*. The Court said, referring to *DelCostello*:

> "There, the Court clearly distinguished *International Union, UAW* v. *Hoosier Cardinal Corp.*, 338 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966), reasoning that when a case involves 'those consequential processes that federal law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlements of disputes under it,' national uniformity is of greater importance."

Petitioner points out that *McCreedy* and the present case (*Apponi* v. *Sunshine Biscuits, Inc.*, 809 F.2d 1210) (6th Cir. 1987) ("*Apponi II*") were decided by the Sixth Circuit eight days apart and reached different conclusions as to whether the six months limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or the state six or fifteen year, statute of limitations should apply. Petitioner seems to take that as evidence of a conflict of opinion within the Sixth Circuit (Petition herein at 13). In fact, there is no such conflict; on the contrary, *McCreedy* and *Apponi II* provide good examples of cases in which the Court of Appeals reconciled and followed the reasoning in both *DelCostello* and *Hoosier Cardinal*. On the one hand, the action to compel arbitration in *McCreedy* was held to be subject to the NLRB Section 10(b) six months limitations, the Court noting that:

> "Just as the employee's unfair representation claim is a creature of labor law, so too, we believe, is a union's action to compel arbitration." *McCreedy* at 1238.

On the other hand, the action to recover pensions was held in *Apponi II*, the instant case, to be governed by the state contract statute of limitations, the Court noting that this case is more like *Hoosier Cardinal* than *DelCostello*. Petitioner's Appendix at A-7.

No case is cited by Petitioner (and none is found by Respondents) which holds that the six months NLRA Section 10(b) statute of limitations should apply, rather than a state contract statute of limitations, to an action to recover money benefits under a union contract as in *Hoosier Cardinal* or a pension plan as in the instant case.

If it is the intention of this Court that the six month statute of limitations apply in cases like *DelCostello* which go to the heart of the federal interest in employer/union/employee relations, but that state statutes of limitations continue to govern cases like *Hoosier Cardinal* which seek simply the recovery of money benefits under a union contract, then this case, which falls squarely into the latter category, does not raise any issue which would require resolution by this Court.

Even if it were the intention of this Court to abandon both *DelCostello* and *Hoosier Cardinal*, and to hold that the six months statute of limitations contained in Section 10(b) of the National Labor Relations Act is applicable to an action under Section 301 to recover money benefits under a labor agreement, this case is not a good vehicle for such change because the statute of limitations issue under Section 301 of the LMRA is not reached unless three other questions, extraneous to the questions presented, are first decided adversely to Respondents:

(1) Whether a defense under Section 301 survived the failure to plead or raise it timely.

As the Court of Appeals found in *Appoini II*, Petitioner did not raise the argument that this action arises under Section 301 in a timely manner. (Petitioner's Appendix at A-5). It was

neither pleaded in Petitioner's Answer nor otherwise raised at any time prior to the first Court of Appeals decision in this case (*Apponi* v. *Sunshine Biscuits Inc.*, 652 F.2d 643) (6th Cir. 1981) ("*Apponi I*").

In order to reach the question of what statute of limitations should be applied under Section 301 in this case, therefore, the Court would first have to decide that Petitioner's defense of statute of limitation under Section 301 survived Petitioner's failure to have pled it or raised it prior to the decision in *Apponi I*.

The Court in *Apponi II* declined to hold that Petitioner's failure to have pled or previously raised the defense of the statute of limitations under Section 301 barred the defense, apparently on the ground that this is a Section 301 case (Petitioner's Appendix at A-5).

If that holding is erroneous (as Respondents would urge), then the defense of statute of limitation under Section 301 has been waived and the questions presented in the Petition are not reached.

(2) Whether the statute of limitations question in this action to recover pensions is governed by LMRA or by ERISA; and, if ERISA, what limitation period should apply.

Section 502(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1), authorizes a civil action by a pension plan participant or beneficiary to recover benefits under the plan.

Respondents' employment by Petitioner was terminated, and the misrepresentations which gave rise to the claimed estoppel in this case were made, prior to the enactment of ERISA in 1974. Respondents were all under the early retirement age of 55, however, when their jobs were ended, and do not claim to have been eligible for pensions in any view of the case until after they reached the age of 55.

Several Courts of Appeals have held that, although the substantive provisions of ERISA are inapplicable when the acts or omissions complained of occurred before ERISA, nevertheless, where the actual payment of benefits was not due, and claims for benefits, therefore, could not effectively have been made, until after the enactment of ERISA, the procedural provisions of ERISA apply. See, e.g., *Reiherzer* v. *Shannon*, 581 F.2d 1266 (7th Cir., 1978); *Cohen* v. *Martin's*, 694 F.2d 296 (2nd Cir., 1982); *Van Fossan* v. *International Brotherhood of Teamsters*, 649 F.2d 1243 (7th Cir., 1981); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir., 1981); *Paris* v. *Profit Sharing Plan*, 637 F.2d 357 (5th Cir., 1981), cert. den., 454 U.S. 836 (1981); *Winer* v. *Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir., 1979); *Jameson* v. *Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir., 1985). See also, *Sethre* v. *Washington Education Association*, 22 Wash. App. 666, 591 P.2d 838, review den., 92 Wash. 2d 1020 (1979). But see, *Martin* v. *Bankers Trust Co.*, 565 F.2d 1276 (4th Cir., 1977); *Quinn* v. *Country Club Soda*, 639 F.2d 838 (1st Cir., 1981).

If the Courts of Appeals which have applied ERISA procedural provisions in the pre-ERISA cases noted above are correct, the statute of limitations under ERISA would seem to apply to this action to recover pensions rather than the statute of limitations as it may be found under Section 301 of the Labor Management Relations Act.

Several Courts of Appeal have held that, since ERISA does not contain any general statute of limitations applicable to actions by beneficiaries or participants to recover pension benefits, the most appropriate state statute of limitations should be applied. *Jenkins* v. *Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir., 1983); *Miles* v. *New York State Teamsters Conference*, 698 F.2d 593 (2d Cir., 1983), cert. den. ____ U.S. ____, 104 S.Ct. 105. See also *Adams* v. *Gould, Inc.*, 739 F.2d 858 (3d Cir., 1984), reh. den. 7/25/84.

If those decisions are sound, the decision in *Apponi II* applying an Ohio contract statute of limitations is correct.

(3) Whether DelCostello should in any event be applied retroactively to a cause of action which arose some time prior to the filing of this action in 1977.

Although some Courts of Appeals have held simply that the *DelCostello* decision applies retroactively to all suits under Section 301 pending at the time of the decision (see, e.g., *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir., 1984); *Andres* v. *Teamsters Local 600*, 724 F.2d 73 (8th Cir., 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir., 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir., 1983)), the Courts of Appeals in at least three circuits have held that *DelCostello* should not be applied retroactively to bar actions such as the present one.

The Ninth Circuit has held in several cases that *DelCostello* should be applied retroactively where to do so will extend the statutory period, but should not be applied retroactively so as to bar a suit which was timely under the appropriate state statute when filed or which was filed within six months after the date of the *DelCostello* decision. *Peterson* v. *Kennedy*, 771 F.2d 1244 (9th Cir., 1985); *Edwards* v. *Teamsters Local Union 36*, 719 F.2d 1036 (9th Cir., 1983), cert. den. ____ U.S. ____, 104 S.Ct. 1599; *Acri* v. *International Association of Machinist*, 781 F.2d 1393 (9th Cir., 1986); *Kelley* v. *International Brotherhood of Electrical Workers*, 803 F.2d 516 (9th Cir., 1986).

The Tenth Circuit has held that *DelCostello* should not be applied retroactively to shorten the limitation period. *Jones* v. *Consolidated Freightways Corp. of Delaware*, 776 F.2d 1458 (10th Cir., 1985).

The Second Circuit first applied *DelCostello* retroactively. *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), cert. den., ____ U.S. ____, 105 S.Ct. 512 (1984). Later, however, the Second Circuit declined to apply *DelCostello* retroactive-

ly. *Byrne* v. *Buffalo Creek Railroad Company*, 765 F.2d 364 (2d Cir., 1985). The Court in *Byrne* distinguished *Welyczko* because *Byrne* presented:

> ". . . the rare question in this circuit, of whether a litigant should be deprived, after ten years of litigation, of a judgment for wrongful discharge and unfair representation because during litigation delays, for which the district court must bear the major responsibility, the Supreme Court changed the law regarding the applicable statute of limitations for the bringing of his suit." *Byrne* at 365.

The Court concluded:

> "Here, there has been nearly ten years of costly litigation and a full trial on the merits which resulted in a determination that Byrne is entitled to damages. These extraordinary circumstances compel us to carve out a limited exception to our holding in *Welyczko* that *DelCostello* applies retroactively."

The distinguishing facts in *Byrne* are strikingly similar to the facts in the present case: *Apponi* is a pension case begun in 1977, tried to a jury in 1982, appealed to the Sixth Circuit Court of Appeals three times, and still pending in 1987 with the end nowhere in sight.

Whether ruled upon explicitly, whether left unmentioned, or whether dealt with in some other fashion, a holding by this Court that the Respondents' claims are barred by the six months statute of limitations would seem necessarily to include holdings that the defense of statute of limitations under Section 301 survived Respondent's failure to raise it timely; that Section 301 of LMRA rather than ERISA determines the applicable statute of limitations in this action to recover pensions; and that *DelCostello* should be applied retroactively to

this suit which was filed six years before *DelCostello* and which has been in the federal courts ever since.

CONCLUSION

The decision below follows the decision of this Court in *Hoosier Cardinal* and distinguishes this case from *DelCostello* in essentially the same way that this Court in *DelCostello* distinguished *Hoosier Cardinal*. The Court of Appeals cases cited by Petitioner, although reaching varying results, are not in conflict, as Petitioner claims, but reach different results based upon the distinctions made by this Court. This case, therefore, presents no issue which requires intervention of this Court.

Even if this Court chooses to extend *DelCostello* so as to subject a simple action for money benefits under a union-negotiated pension plan to the six month statute of limitations of Section 10(b) of the NLRA, that issue is clouded in this case by questions of waiver of defenses, of application of ERISA, and of retroactivity of judicial decision.

The Petition for Certiorari should be denied.

Respectfully submitted,

Asher Bogin
Counsel of Record

BOGIN & PATTERSON
1200 Talbott Tower
131 N. Ludlow Street
Dayton, OH 45402
(513) 226-1200

Attorney for Respondents